

No. 11821

United States
Court of Appeals

for the Ninth Circuit

DAWSON COUNTY, MONTANA, and PRAIRIE
COUNTY, MONTANA,

Appellants,

vs.

MARY HAGEN, E. B. CLARK, MINNIE R.
EVANS and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGEN, E. B. CLARK, MINNIE R.
EVANS,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE, RUBY YALE,
RUTH PETTERSON, HANS PETTERSON,
SCOTTISH AMERICAN MORTGAGE COM-
PANY, LIMITED, UNITED STATES OF
AMERICA, DAWSON COUNTY, MONTANA,
and PRAIRIE COUNTY, MONTANA,

Appellees.

S U P P L E M E N T A L

Transcript of Record

Appeals from the United States District Court
for the District of Montana

FEB -4 1949

PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Court of Appeals
For the Ninth Circuit

No. 11,821

Nov. 1, 1948

DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGEN, E. B. CLARK, MINNIE R.
EVANS and UNITED STATES OF AMER-
ICA,

Appellees.

MARY HAGEN, E. B. CLARK and MILLIE R.
EVANS,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE, RUBY YALE,
RUTH PETTERSON, HANS PETTERSON,
SCOTTISH AMERICAN MORTGAGE COM-
PANY, LIMITED, UNITED STATES OF
AMERICA and DAWSON COUNTY, MON-
TANA,

Appellees.

Appeals from the United States District Court for
the District of Montana.

Before Mathews, Bone and Orr, Circuit Judges.
Per Curiam.

OPINION

These appeals are from parts of a judgment entered on September 4, 1947, in a proceeding by the

United States against Dawson County, Montana, Mary Hagen, E. B. Clark, Minnie R. Evans, Edna Yale, Allen W. Yale, Ruby Yale, Ruth Petterson, Scottish American Mortgage Company, Limited, and others for the condemnation of land in Montana.

A complaint and two amended complaints were filed by the United States. Answers and petitions for distribution were filed by Dawson County, Mary Hagen, E. B. Clark and Minnie R. Evans. Issues of fact and of law were raised. On these issues, hearings were had and evidence was taken.

Before entering judgment, the District Court should have made findings of fact and should have stated conclusions of law. See §§9366, 9367 and 9954 of the Montana Revised Codes of 1935; Coffman v. Niece, 110 Mont. 541, 105 P. 2d 661; 40 U.S.C.A. §258; Rule 81(a) (7) of the Federal Rules of Civil Procedure. This was not done.

Therefore those portions of the judgment which are here appealed from are vacated, and the case is remanded to the District Court with directions to make findings of fact and state conclusions of law, as required by §§9366, 9367 and 9954 of the Montana Revised Codes of 1935, and thereupon enter such judgment as may be proper.

[Endorsed]: Per Curiam Opinion. Filed Nov. 1, 1948. Paul P. O'Brien, Clerk.

NAMES AND ADDRESSES OF ATTORNEYS

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Glendive, Montana,
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CECIL N. BROWN,
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Attorneys for Appellees, Mary Hagen,
et al.

JOHN B. TANSIL,
United States District Attorney,
Billings, Montana,
Attorney for Appellee, United States of
America. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court of the United States for the
District of Montana, Billings Division

Civil No. 348

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL T. MARKEY, ET AL,

Defendants,

MOTION TO ADOPT FINDINGS OF FACT
AND CONCLUSIONS OF LAW.

Comes now the Defendants, Dawson and Prairie
Counties, in the above entitled action and move
the Court for an order adopting the attached Find-
ings of Fact and Conclusions of Law.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Dawson
County, Montana.

/s/ CECIL N. BROWN,

Attorney for Prairie County,
Montana.

FINDINGS OF FACT

The above entitled cause came on for hearing on
December 13, 1946, at Billings, Montana, pursuant
to the previous order of the Court, before the un-
dersigned, one of the Judges of said Court, C. M.
Buntin, Special Ass't United States Attorney, ap-
pearing as "Amicus Curiae," D. C. Warren, At-
torney for Dawson County and P. F. Leonard and
Desmond J. O'Neil, Attorneys for Defendant Mary
Hagen et al; bondholders were present:

Upon the evidence adduced, upon all of the records and files herein and after due consideration the Court finds the following: [2]

I.

That the United States of America, the plaintiff, a sovereign under authority of law acquired title to the lands described in its Declaration of Taking, filed April 27, 1942, under Section 258 A 40 USCA, to the lands described as follows:

Dawson County, Tract No. 494

Township 13 North, Range 53 East

Section 1 —S $\frac{1}{2}$.

Section 10—S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$.

Section 11—S $\frac{1}{2}$.

Section 12—NW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, Lots 1, 2, 3, 4.

Section 13—Lots 2 & 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$.

Section 14—Lots 1 & 2, N $\frac{1}{2}$ SW $\frac{1}{4}$, Lot 3, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$.

Section 15—All.

Section 16—SW $\frac{1}{4}$, That part of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ lying Southeast of U. S. Highway No. 10, and more particularly described as follows: Beginning at the Southeast corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Thence West along the South line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$, a distance of 1320 feet, thence North along the West line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$, a distance of 931.5 feet to the South line of U. S. Highway No. 10, thence North 67°14' East along the South line of said highway a distance of 919.9 feet to its intersection with the North line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$, thence East along

the North line of said $SE\frac{1}{4}NW\frac{1}{4}$, a distance of 438.5 feet, thence South along the East line of said $SE\frac{1}{4}NW\frac{1}{4}$, a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less.

Section 21—All fractional section.

Section 22—Lots 1, 2, 3, 4, $NW\frac{1}{4}NE\frac{1}{4}$; $N\frac{1}{2}NW\frac{1}{4}$; $SW\frac{1}{4}NW\frac{1}{4}$.

Section 23—Lot 8.

Township 13 North, Range 54 East

Section 6—Lots 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, $SE\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}$, Containing 4,164.69 acres.

Prairie County, Tract No. 511

Township 13 North, Range 53 East

Section 20— $N\frac{1}{2}NE\frac{1}{4}$, $W\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$, $SE\frac{1}{4}$, $S\frac{1}{2}NE\frac{1}{4}$.

Section 28—Lots 1 and 2.

Section 29—Lots 2, 3, 4, $NW\frac{1}{4}$, $N\frac{1}{2}NE\frac{1}{4}$, $NW\frac{1}{4}SW\frac{1}{4}$.

Section 30— $SE\frac{1}{4}SE\frac{1}{4}$, Lots 3 and 4, $NE\frac{1}{4}$, $N\frac{1}{2}SE\frac{1}{4}$.

Containing 1,309.60 acres.

Robert Henderson Estate, Tract No. 1-12

Township 13 North, Range 53 East

Section 30—Lots 1 and 2, and $E\frac{1}{2}NW\frac{1}{4}$ Containing 158.60 acres.

Edna Yale, Tract No. 1-27

Township 13 North, Range 53 East [3]

Section 16—That portion of the $NW\frac{1}{4}$ lying northerly of the following described line: Beginning at a point on the west line of said Section 16

which point lies south 2262.5 feet from the NW corner of said Section 16, thence N. $67^{\circ}14'$ E, a distance of 2863 feet to a point on the east line of said NW $\frac{1}{4}$ which point lies south 1154.5 feet from the NE corner of the NW $\frac{1}{4}$ of Section 16.

Containing 103.55 acres.

Scottish American Mortgage Company, Limited,
Tracts Nos. 1-47 & 1-53

Township 13 North, Range 53 East

Section 14—Lot 4 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Containing 51.77 acres.

By agreements with the Counties the total acreage of the purchase and the consideration therefor, and also through condemnation proceedings in this cause, wherein commissioners were appointed by the Court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded just compensation for the same total acreage the same amount of money as had theretofore been agreed upon between the Government and the Defendant Counties, which sum was deposited in the registry of the Court.

II.

That the Defendant, Upper Glendive Fallon Irrigation District was created under the Laws of Montana in December, 1921, embracing the lands described in the Declaration of Taking, as Tracts 494 and 511, and thereafter took proceedings under the Laws of Montana, to issue Irrigation Bonds in a total sum of One Hundred Fifty Thousand and

00/100 (\$150,000.00) Dollars, for the general purposes of said District; the bond issue being confirmed by Order of Court on December 2, 1922, and thereafter bonds in the principal amount of Eighty One Thousand Five Hundred and 00/100 (\$81,500.00) Dollars were sold to the public, none of which have been paid as to principal and interest thereon unpaid since January 1, 1928. [4]

IV.

That the Commissioners of said District took legal action to determine the area in each forty (40) acre tract in said District, subject to assessment for irrigation taxes and after said determination levied taxes in the years 1922, 1923 and 1924, for organization and other authorized purposes.

V.

That thereafter taxes were levied for Irrigation District Purposes in the years 1925 to 1938 by order of the Public Service Commission of Montana.

VI.

That the lands involved herein were duly assessed for taxes by the proper officers of Dawson and Prairie Counties in each year from 1923 to 1939 and taxes thereon not having been paid the Defendant counties by due and legal proceedings obtained title to the said lands by tax deeds and thereby the said defendants, Dawson and Prairie Counties, become the owners of said real estate, free and clear of any and all encumbrance.

VII.

That thereafter the Counties of Dawson and Prairie, Montana, by agreement sold said lands described in the Declaration of Taking, Paragraph I hereof owned by them, at the consideration set forth therein, as just compensation to-wit:

Dawson County Tract 494, \$23,526.00

Prairie County Tract 511, \$7,680.00

and stipulations fixing said values for said lands were duly executed by the proper authorities of said Counties on September 3, 1941, and filed herein on October 23, 1946.

VIII.

That orders for Distribution were made thereon on July 11, 1944, distributing to each of said Counties the amount of money representing the general taxes being the sum of Ten Thousand [5] Six Hundred Twenty-Eight and 57/100 (\$10,628.57) Dollars, to Dawson County and the sum of Twenty-Seven Hundred Twenty-Five and 54/100 (\$2725.54) Dollars to Prairie County, leaving a balance in the registry of the Court for further distribution in the sum of Nineteen Thousand Thirty-Four and 89/100 (\$19,034.89) Dollars.

IX.

That Tract No. 1-27, the Yale lands, and Tract No. 1-47 and 1-53 for which the sums of \$758.00 and \$425.00, respectively, were deposited in the registry of the Court are not susceptible of irrigation, were never assessed for that purpose or that title to said tracts was not obtained from the Counties or that the irrigation District or the bondhold-

ers have any lien upon the compensation deposited in the registry of the Court as to these tracts of land.

X.

That the irrigation district was legally organized and that the irrigable area subject to the lien of the bondholders was fixed and the board of directors as provided by one prior to the making of assessments and the issuance of bonds. So far as can be ascertained from the record none of the land owners in the district ever paid any of these assessments or any part of the bonded indebtedness, and none of the lands designated by the board of directors as irrigable were ever irrigated. Section 7235, M.C. 1921, as amended by Chapter 147, Session Laws of 1923, P. 473.

XI.

From the foregoing Findings of Fact the Court makes the following,

CONCLUSIONS OF LAW

1. That the Defendants, Dawson and Prairie Counties sold to the Government for the consideration fixed in the Declaration of Taking, filed herein, Tracts 494 and 511, respectively, [6] owned by them under tax deed proceedings wherein said Counties became the owners of said tracts of real estate free and clear of any encumbrance, and that the purchase price having been agreed upon by the owners and the Government and the latter having acquired

title thereto in this condemnation action, the price agreed upon is binding upon both parties. Bank v. Edenton (4 Cir.) 152 Fed. (2) 251-4.

2. That the sum in the registry of the Court be distributed as follows:

a. To Dawson County the sum of Twelve Thousand Eight Hundred Ninety-Seven and 43/100 (\$12,897.43) Dollars, balance of consideration agreed upon by the said County and United States of America.

b. To Prairie County, Montana, the sum of Four Thousand Nine Hundred Fifty-Four and 46/100 (\$4954.46) Dollars, balance of consideration due said County by agreement between it and United States of America.

c. The sum of Seven Hundred Fifty-Eight and 00/100 (\$758.00) Dollars to the Yale heirs covering Tract 1-27.

d. The sum of Four Hundred Twenty-Five and 00/100 (\$425.00) Dollars to the Scottish American Mortgage Company, being the just compensation awarded for Tracts 1-47 and 1-53.

Let judgment be entered accordingly.

.....
District Judge.

[Endorsed]: Lodged in Clerk's office Nov. 24, 1948. [7]

[Title of District Court and Cause.]

Pursuant to the order of the Circuit Court of Appeals the Court now makes Findings of Fact and Conclusions of Law which were not requested by any party in the case.

After considering the evidence and the admitted facts the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The plaintiffs, in pursuance of the Act of February 25, 1931, (48 Stat. 1421) (40 U.S.C.A. 258a) and Acts supplementary and amendatory did on April 27, 1942, file in this action a declaration of taking and did take immediate possession of the lands involved and thereupon deposited in the registry of this Court the sum of \$34,489.00 and a complaint whereby the Secretary of Agriculture was alleged to have acted pursuant to the Act of October 14, 1940, (54 Stat. 1119) and the Act of August 1, 1888 (24 Stat. 357) did seek to procure 5788.21 acres of land in Prairie and Dawson Counties, Montana, for Governmental public purposes in the construction, operation and maintenance of a project to reclaim and irrigate said lands alleged to be arid and semi-arid and nearly all of said lands were within and a part of the Upper Glendive-Fallon Irrigation District which had been duly created as a public corporation on December 20, 1920, and which has never been dissolved, and an amended complaint in condemnation was filed by the Government [8] on March 27, 1944, wherein all known bondholders of said irrigation district were

2. On May 13, 1944, an Answer, Counter Claim and Cross-Claim was filed by Mary Hagen, E. B. Clark and Minnie Evans on their own behalf as bondholders of said irrigation district and on behalf of all of the other bond holders of said district and on behalf of all defendants similarly situated and having a common interest and a list showing the names and addresses of said bondholders and the amounts held were made a part thereof and the bondholders thereby petitioned that the compensation deposited with the Court be paid to all bondholders in preference to the claim of any other defendant and on May 20, 1944, defendant Dawson County filed Answer and claimed that it had acquired title by tax deed to the tracts of land described in the amended complaint as Tracts 494-1 to 494-14 and petitioned the Court to make distribution to said County of the compensation deposited for said tracts in the sum of \$23,526.00, and defendant Prairie County filed Answer and claimed the right to and distribution of \$7680.00 of the compensation deposited for tracts 511-1 to 511-7 and described in said amended complaint. Dawson County filed a reply on May 20, 1944, denying the answer, counter-claim and cross-claim of the bondholders.

3. The allegations of the Governments amended complaint were admitted by the defendants appearing and no issue was raised thereto. The defendants Dawson and Prairie Counties disclosed in their answers and by separate statements the amount of general taxes levied and assessed against the lands sought to be condemned and unpaid at the time the

also disclosed the amount of the special assessments which were levied and assessed against said lands at the time the said tax deeds were issued to said Counties, and on the petitions filed by said Counties [9] separate orders were entered on July 11, 1944, whereby in Dawson County on Tracts 494-1 to 494-14 excepting 494-14a it was determined that the general taxes due said County at the time of taking tax deed were \$10,628.57 and that there were due at that time delinquent unpaid assessments levied and assessed for said irrigation district in the sum of \$41,662.98 but that Dawson County had a first and superior lien against said lands at the time tax deeds were issued and was entitled to be paid such general taxes in the sum of \$10,628.57 and payment was directed and made accordingly from said deposit and by separate order it was also determined, held and entered that Prairie County was entitled to its said general taxes at the time it took tax deeds on tracts 511-1 to 511-7 in the sum of \$2725.54 and that the delinquent, unpaid assessments made and unpaid and which were levied for said irrigation district by said County amounted to \$9343.12 but that the said County was entitled to be paid as a prior right the said sum for general taxes amounting to \$2725.54 and which was paid from said compensation on deposit.

4. Thereafter Commissioners were appointed to appraise the property and to fix the compensation to be paid for each tract of land and they appraised each tract of land separately and fixed the compen-

sation of which notice was given to the parties who had appeared which return of the Commissioners was filed and entered October 1, 1945, and on December 5, 1945, a final judgment in condemnation was filed and entered which conformed to the amended complaint and the report of the Commissioners and compensation was separately fixed as to each separate tract of land as described in the decree and in the report of the Commissioners and in the complaint. Tract No. 1-12 was not embraced in the report of the commissioners or in the final judgment in condemnation but said Tract was purchased direct by the Government from the Executor of the Will [10] of Robert Henderson, Deceased.

The principal or only question for the Court to determine, as submitted by the parties in the condemnation proceeding, related to the disposition of the compensation deposited by the Government in the registry of the Court and involved questions of law rather than questions of fact.

No question arose in the case regarding the creation or organization of the Irrigation District and the proceedings involving the irrigation district were introduced by bondholders original Exhibit No. 3 and by the map or plat of the District Exhibit No. 3 which showed the location and boundaries and the two lifts or elevations required. The bonds in question were issued by the District and authorized by judgment of the District Court confirming the issue for the purpose of providing funds for the construction of irrigation works for said district and included the purchase of a pump-

ing plant and certain coal lands all in accordance with the plan of reclamation for the district and approved by the Public Service Commission of the State of Montana. No question has arisen regarding the validity of the general taxes which were assessed against the lands or regarding the validity of the special improvement assessments which were also levied and assessed against the lands and the general taxes and the levy thereof and the assessments and the levy thereof constituted the basis on which the tax deeds were issued and said tax deeds merged the general taxes and the special assessments. \$150,000.00 in bonds were authorized but only \$81,500.00 in bonds were sold or issued. The bondholders have taken no appeal from the order allowing the County of Dawson and the County of Prairie payment of general taxes and no contention was made in the final hearing in regard to that question and the Court considered from the statements made of the parties that that question was agreed to.

5. Many hearings were held before the Court and some [11] testimony taken but the principal question involved the question of law as to the right to compensation. A pre-trial conference was held and the parties presented to the Court statement of fact and many briefs were filed including briefs by Government Special Counsel on the questions of law and it was determined after consideration of all of such matters and the admitted facts that there was no deposit with the Register of the Court excluding the Henderson tract the sum of \$19,034.89

being the amount that remained after the payment of the general taxes to Dawson County and to Prairie County but a mistake was made in the orders made on July 11, 1944, which mistake is evident and was easily made and was due to the fact that the compensation or award was made more than a year after the orders for the payment of general taxes and of necessity the payment of taxes cannot exceed the total award made. A statement thereof is as follows:

Award as Determined by the Commissioners Report
and the Judgment of Condemnation

Dawson County,

Tract No. 494-8 full compensation.....	\$ 680.50
Tract No. 494-11 full compensation.....	995.00
Tract No. 494-13 full compensation.....	606.90
Total awards and compensation paid.....	\$2282.40

Under the order of July 11, 1944, Dawson County was actually paid the following amount as the estimated general taxes due the County:

Tract No. 494-8 taxes paid.....	\$ 695.58
Tract No. 494-11 taxes paid.....	2348.94
Tract No. 494-13 taxes paid.....	2552.94
Total taxes paid	\$5597.46

Hence it is evident that Dawson County was over paid on said tracts the sum of \$3,315.06. That was the total amount over and above the total award and the general taxes paid to the County could not exceed the total award. [12]

Prairie County:

Tract No. 511-6 Total award and Compensation paid	\$ 890.00
Total taxes paid by Order of July 11, 1944.	1217.86

Thus Prairie County was over paid on said tract the sum of \$327.86 which to that extent was more than the total award and compensation and in all cases mentioned the mistake was evident and should be corrected. In computing the amounts of excess payment Special Counsel for the Government agreed that the figures on over-payment to the Counties submitted by the bondholders were substantially correct and should be accepted by the Court.

5. That no appeal was taken from the creation of the irrigation district involved and no appeal was taken from the order of confirmation on the issuance of the bonds of said district and under the laws governing the creation of the district and the establishing of the boundaries thereof and the validity of the bonds have now passed beyond question and cannot be re-litigated at this time.

6. That all of the bonds issued by said irrigation district were dated January 1, 1923, and were redeemable at the option of said district on the 1st day of January of any year after 20 years from the date thereof and draw interest from the date until paid at the rate of 6% per annum payable semi-annually on the first days of January and July of each year. That said bonds were negotiable instruments and negotiated and sold under the direction of the Commissioners of said irrigation district in accordance with the laws of Montana, and the Board of Public Service Commission of the State of Montana, attached to each bond a certificate that said bond was issued in accordance with

the laws of the State of Montana and that each of said bonds was duly registered in the office of the County Treasurer of Dawson County, Montana and they were sold and negotiated for cash and delivered to the County Treasurer of Dawson County, Montana, who delivered the same to the purchasers upon receipt of the purchase [13] money and that all of said bonds were sold in good faith to the purchasers and they are innocent holders thereof free and clear of any claims that might be made by said district.

7. Pursuant to law and according to their duty the Commissioners of the irrigation district did each year provide for an annual levy and collection of the special tax and assessment upon all of the lands included in the district which would have been sufficient if said levy and collection had been continued to pay said bonds and interest. That all of the bonds listed in the cross-claim and counter-claim are due, owing and unpaid and bear interest at the rate of 6% per annum from January 7, 1927.

8. Subsequent to the issuance of said bonds the defendants, Dawson County and Prairie County, took proceedings to acquire tax title to said lands but the levies made and the tax proceedings were had for the protection of both the general taxes and the special improvement taxes and the amounts due at the time of the issuance of the tax deeds and the basis therefor were the general taxes and the special assessments and the amounts of the general taxes and the amounts of the special assessments on which

tax deeds were issued are set forth in the answer filed by the defendant, Dawson County.

That insofar as Dawson County is concerned all of the lands within the irrigation district were taken by tax deed on December 11, 1939. That the dates different therefrom as shown by the certificate of the County Clerk and Recorder do not involve lands within the irrigation district.

9. That after the County had obtained tax deeds to the lands in Dawson County and in said irrigation district the Board of County Commissioners passed a resolution for the sale of said lands at market value thereof but the sale to be subject to the lien of the unpaid balance of the bonds issued by the Upper Glendive-Fallon Irrigation District on January 1, 1923, and [14] the notice of sale issued by the County Clerk thereon contained the same provision.

10. As to the Yale Tract No. 1-27 the Court considered that the land was never susceptible to irrigation from the irrigation district in question and was never assessed for that purpose. However, the tract was included within the boundaries of the irrigation district and was never excluded or withdrawn therefrom. It is also noted that Fred Yale the owner of the property was one of the petitioners who signed the petition for the issuance of the bonds in question and he as president of the district presented the resolution for the issuance of the bonds and signed the bonds.

11. As to the plat known as Nos. 1-47 and 1-53, The Scottish American Mortgage Company tract,

the land involved was within the boundaries of the irrigation district and Mary E. Lewis was the owner of the property according to the last assessment rolls of Dawson County at the time the district was created. She appeared through her attorney at the hearing but notwithstanding her objections the Court created the district based on the evidence including the report of the State Engineer and then adjudged that the lands were susceptible of irrigation from the same general source and the same system and included the land within the district. No appeal was perfected from said judgment.

12. It appears from the evidence that Dawson County did have negotiations with the Government for the sale of the land in question but the County was unable to deliver satisfactory title to the Government and hence the condemnation proceedings resulted. The negotiations for the sale of the said land from the County to the Government thereupon terminated.

13. In regard to the attorneys fees claimed by Messrs. O'Neil and Leonard, representing the bondholders, the Court does not find that the bondholders other than those specially [15] employing said attorneys have authorized payment of the counsel fee. It is true that the said attorneys have expended much labor and considerable expense on behalf of the bondholders which will inure if compensation be avoided from the money on deposit to the benefit of all bondholders, but the express authority of employment is not shown as to all of the bondholders.

CONCLUSIONS OF LAW

Wherefore, the Court concludes,

1. The lien of general taxes due said Counties at the time tax deeds were taken were superior to the lien of the special assessments of said irrigation district and the liens of said bondholders under said district but in taking tax deeds the Counties acted for the benefit of the public agencies represented and benefited through the tax levies made in the tax proceedings in question and the Counties took and held tax deeds as trustees for the benefit of said District as well as for general taxes and the Counties having been paid the general taxes under the compensation deposited in the Court, therefore under the law and well-founded principles of equity all the balance of the money except as herein provided now on deposit in the Registry of this Court should be paid to the bondholders under the rule announced in:

State ex rel Malott, et al vs. Board of County Commissioners, 89 Mont. 37 and
Toole County Irrigation District vs. Moody,
125 F (2) 498.

2. The Court further concludes that Dawson County and Prairie County had no power excepting that conferred by law. They are not municipal corporations and are pure creatures of the State and subject to legislative control and as such have no constitutional restrictions against enactments by the legislature.

Franske vs. Fergus County, 76 Mont. 150.

Yellowstone Packing Co., vs. Hayes, 83 Mont.

1.

State vs. Holmes, 100 Mont. 256.

Hence the Court concludes that the Legislature of Montana could, as to the said Counties, waive its tax priority and did so by Chapter 63 of the Laws of 1937 amending Section 2215.9 of the Montana Code whereby it protected the lien of the irrigation assessments levied and payable subsequent to the tax deed. Here the bondholders have the right to require assessments to pay the principal and interest of the bonds even after the issuance of the tax deeds. Such right, of course, was subject to the prior law of condemnation. [17]

3. Distribution ordered to be made to the bondholders herein is required to be made on a pro-rata basis.

State ex rel Central Auxiliary Corporation vs. Rorobeck, County Treasurer et al, 111 Mont. 320.

4. The Court also concludes that the bondholders of said irrigation district are not entitled to any lien on the two tracts known as the Yale Tract No. 1-27 on which the compensation awarded was \$758.00 nor any lien on the Scottish American Tract Nos. 1-47 and 1-53 for \$425.00 and said bondholders are not entitled to compensation on said tracts.

5. The Court also concludes that the compensation paid on July 11, 1944, to Dawson County on Tracts 494-8, 494-11 and 494-13 whereby the said

County was over-paid the sum of \$3315.06 was made by mistake on petition of said County and with the knowledge and without the objection of the Government and the compensation paid thereby reduced the amount deposited with the Registry of the *Clerk* and made by the Government to the extent of the over-payment.

And the compensation paid on July 11, 1944, to Prairie County on Tract 511-6 whereby said County was over-paid \$327.86 was made by mistake on petition of said County and with the knowledge and without objection of the Government and the payment thereby reduced the amount deposited by the Government.

The Court therefore concludes that Dawson County should be ordered to forthwith return to the Registry of this Court the sum of \$3315.06 bearing legal interest from July 11, 1944, until paid. That Prairie County should be ordered to forthwith return to the Registry of this Court the sum of \$327.86 and legal interest from July 11, 1944, until paid, and the compensation awarded to that extent not being on deposit since July 11, 1944, it is proper, under Section 258-a, 40 U.S.C.A. that judgment be entered against the United States for the sum of \$3642.92 with interest at 6% per annum from July 11, [18] 1944, in favor of the defendant bondholders.

United States vs. Miller, 317 U. S. 369, 63 S.
Ct. 276 87 L. ed. 336, 147 A.L.R. 55.

Dated this 24th day of November, 1948.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Nov. 24, 1948.

[19]

In the United States of America, United States
District Court, District of Montana, Billings
Division.

No. 348

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL T. MARKEY, et al,
Defendants.

JUDGMENT

The Court having made Findings of Fact and
Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged
and Decreed:

That defendants, Dawson County and Prairie
County, were each paid under orders entered July
11, 1944, the full payment of general taxes and
neither of said counties have any further claim on
any compensation awarded or on deposit herein.

That the sum of \$758.00 awarded on the Yale
Tract No. 1-27 is ordered, adjudged and decreed
paid to Edna Yale, Alan W. Yale and Ruby Yale,
his wife and Ruth Pettersen and Hans K. Petter-
sen, her husband, and

That the sum of \$425.00 awarded on Tracts Nos. 1-47 and 1-53 be paid to the Scottish American Mortgage Company or its successors or assigns and

That the sum of \$17,851.89, being the balance remaining on deposit with the Registry of this Court, be paid pro-rata to the defendant bondholders of the Upper Glendive-Fallon Irrigation District.

It Is Further Ordered, Adjudged and Decreed that Dawson County, Montana, forthwith return and pay to the Registry of this Court the sum of \$3315.06 with interest thereon at 6% per annum from July 11, 1944, until paid, and that Prairie County, Montana, forthwith return and pay to the Registry of this Court the sum of \$327.86 with interest thereon at the rate of 6% per annum from July 11, 1944, until paid, and in default thereof [20] the United States Government may proceed against said Counties to recover such respective amounts.

That the defendant bondholders are awarded judgment against the United States for the further sum of \$3642.92 with interest thereon at the rate of 6% per annum from July 11, 1944, until paid, which amount should be paid into the Registry of this Court for the excess payments paid to said Counties and which money shall be paid said bondholders pro-rata.

It Is Further Ordered, Adjudged and Decreed that Messrs. O'Neil and Leonard are denied attorneys' fees as against the compensation or funds

on deposit or to be deposited with the Registry of this Court excepting only as to those bondholders expressly represented by them.

Done in open Court this 24th day of November, 1948.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed November 24, 1948. [21]

[Title of Court and Cause.]

Clerk's Docket Entry showing findings of fact and conclusions of law made by Court and judgment entered pursuant thereto filed November 24, 1948:

Nov. 24, 1948—Filed Findings of Fact and Conclusions of Law as adopted by the Court.

Nov. 24, 1948—Filed and Entered Judgment of the Court pursuant to its Findings and Conclusions.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America, Plaintiff, and to Messrs. John B. Tansil and Joseph F. Meglen, Its Attorneys, and to Messrs. P. F. Leonard and Desmond J. O'Neil, Attorneys for Certain Bondholders, and to the Clerk of the Above Entitled Court:

You, and each of you, will please take notice that the defendants, Dawson County, Montana, and

Prairie County, Montana, in the above entitled action, by and through the undersigned, its attorneys, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the Court entered in the said action on November 24, 1948, and to the whole thereof, except the sum of Seven Hundred Fifty-eight Dollars (\$758.00) awarded to the Yale heirs, and the sum of Four Hundred Twenty-five Dollars (\$425.00) awarded to the Scottish American Mortgage Company or its successors or assigns, which said judgment was duly given, made and entered in favor of the defendant bondholders and against the defendant counties.

Dated this 7th day of December, 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Defendants and Appellant Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Defendants and Appellant Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 10, 1948.

[23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Notice of appeal having been heretofore duly given and filed herein, Dawson County, Montana,

and Prairie County, Montana, Defendants and Appellants in the above entitled action, by and through the undersigned, their attorneys, in accordance with Rule 75(a) of the Federal Rules of Civil Procedure, hereby designate the contents of the record on appeal in said cause to include the following documents to wit:

1. Transcript of record filed in the United States Circuit Court of Appeals for the Ninth Circuit December 4, 1947 together with original exhibits filed under order of said Court.

2. Certified tax deed proceedings filed June 14, 1948.

3. Supplemental transcript of record filed September 1, 1948.

4. Motion to adopt findings of fact and conclusions of law lodged with the Clerk by Dawson County, Montana, November 10, 1948.

5. Findings of fact lodged with the Clerk by the bondholders November 10, 1948.

6. Proposed judgment filed November 10, 1948.

7. Findings of fact adopted by the Court and judgment entered November 24, 1948.

8. Notice of appeal filed December 10, 1948.

9. Designation of record on appeal filed December 10, 1948.

10. Proof of continuation of appeal bond filed December 10, 1948.

The Clerk of the above named Court is hereby respectfully requested under his hand and seal to certify and transmit to the Circuit Court of Appeals

in and for the Ninth Circuit true copies of the documents described as follows, to wit:

1. Motion to adopt findings of fact and conclusions of law, by Dawson County, Montana.

2. Findings of fact by bondholders, and judgment.

3. Entry showing findings of fact and conclusions of law made by Court and judgment entered pursuant thereto filed November 24, 1948.

4. Notice of appeal.

5. Designation of record on appeal.

6. Proof of bond payment.

within forty days from the date of notice of appeal or within such further time as shall be allowed therefor.

Dated this 8th day of December, 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Defendants and Appellant Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Defendants and Appellant Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 10, 1948.

[25]

PROOF OF PAYMENT OF BOND ON
APPEAL PAYMENT

Taylor-Tipling and Company

Insurance Bonds

Power Block Annex

Helena, Montana, October 25, 1948.

Hildebrand & Warren,

Glendive,

Montana.

Date: 10/25/48.

Company: National Surety Corp.

Policy Number: Bond 1013700.

Form of Insurance: Appeal Bond for Dawson
County, Montana, U.S.A. vs. Paul T. Markey.

Premium: \$10.00.

Paid 11/5/48. Taylor-Tipling & Co. By Chas.
Day.

[Endorsed]: Filed Dec. 10, 1948.

[26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Cross Appeal—Second Appeal)

Notice is hereby given that the defendants Mary Hagen and E. B. Clark and Minnie R. Evans, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District,

defendants herein, appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court herein rendered and entered on November 24, 1948, as to portions thereof as follows:

I.

From that portion thereof whereby the sum of \$758.00 awarded on the tract known as the Yale Tract No. 1-27 was ordered and adjudged to be paid to Edna Yale, Alan W. Yale and Ruby Yale, his wife, Ruth Pettersen and Hans K. Pettersen, her husband.

II.

From that portion thereof whereby the sum of \$425.00 awarded on Tracts Nos. 1-47 and 1-53 was ordered and adjudged to be paid to the Scottish American Mortgage Company or its successors or assigns.

III.

From that portion thereof whereby it was ordered, adjudged and decreed that Messrs. O'Neil and Leonard were denied attorneys' fees as against the compensation or funds on deposit or to be deposited with the Registry of said Court excepting only as to those bondholders expressly represented by them.

This is a cross appeal and second appeal from

the appeal heretofore taken by Dawson County and Prairie County, Montana.

Dated this 23rd day of December, 1948.

P. F. LEONARD,

DESMOND J. O'NEIL,

Attorneys for said defendants, Appellees and Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[27]

[Title of District Court and Cause.]

BOND FOR COSTS ON CROSS-APPEAL

Whereas, the defendants, Mary Hagen, E. B. Clark and Minnie R. Evans have filed or are about to file a second appeal or cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled District Court rendered and entered on November 24, 1948, as to certain portions of said judgment and they desire to give and file with their notice of appeal a bond for costs on appeal as required by law,

Now Therefore, the said named cross-appellants as principals and the undersigned persons as sureties, in consideration of the premises and of said cross-appeal, do hereby jointly and severally bond themselves in the sum of \$250.00 to the Appellants Dawson County, Montana, and Prairie County, Montana, and the Appellees in the above entitled action.

The condition of this bond is that the said cross-appellants as principals and the said sureties shall pay the costs awarded against them if the said cross-appeal is dismissed or the said portions of

the judgment affirmed and such costs as the Appellate Court may award if the judgment is modified.

Dated December 23, 1948.

MARY HAGEN,
E. B. CLARK,
MINNIE R. EVANS,
Principals.

By P. F. LEONARD,
Their Attorney.
J. E. ARNOLD,
JOS. N. EZLA,
Sureties.

[Endorsed]: Filed Dec. 27, 1948.

[28]

State of Montana,
County of Custer—ss.

The said sureties who executed the foregoing bond being by me, duly sworn each for himself says:

I am a resident and householder within the State of Montana and I am worth over the sum of \$250.00 mentioned in the foregoing bond as the tender thereof over and above all my just debts and liabilities exclusive of property by law exempt from execution.

J. E. ARNOLD,
JOS. N. EZLA.

Subscribed and sworn to before me this 23rd day of December, 1948.

(Seal) DANIEL G. KELLY,
Notary Public for the State of Montana. Residing
at Miles City, Montana. My Commission expires
July 6, 1949.

[29]

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER CROSS-
APPEAL, RULE 75(d)

The points upon which the cross appellants intend to rely upon the cross-appeal are:

I.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Yale Tract No. 1-27 and the Court, without authority, deprived the bondholders of their lien on said lands and their rights to compensation in the sum of \$758.00.

II.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Scottish American Mortgage Co., Ltd., Tracts Nos. 1-47 and 1-53 and the Court, without authority, deprived the bondholders of their lien on said lands and their right to compensation in the sum of \$425.00.

III.

That all bondholders have received the benefit of the services rendered by attorneys D. J. O'Neil and P. F. Leonard, and all bondholders should share in the reasonable expense of this litigation and a reasonable attorneys' fee should be allowed and charged against all bondholders pro-rata.

Dated this 23rd day of December, 1948.

P. F. LEONARD,

DESMOND J. O'NEIL,

Attorneys for said Defendants, Appellees and
Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[30]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL RECORD

The cross appellants respectfully request that in addition to the designation of portions of the record on appeal made by the appellants Dawson County and Prairie County, Montana, that the cross appeal or second appeal served and filed herein be included in said record together with the statement that a bond for costs on appeal, as required by law, has been filed with the notice of cross appeal and that the said record also include the statement of points under said cross appeal.

Dated December 23, 1948.

P. F. LEONARD,
DESMOND J. O'NEIL,

Attorneys for said Defendants, Appellees and
Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[31]

Clerk's Docket Entry Showing Mailing of Copy of
Notice of Appeal; and Copy of Notice of Cross-
Appeal.

Dec. 10, 1948. Mailed copy notice of appeal from Judgment entered Nov. 24, 1948, to Counsel: P. F. Leonard, Miles City, Mont., for bondholders.

Dec. 27, 1948. Mailed copy of notice of Cross-Appeal by Mary Hagen, et al, bondholders, from Judgment of Nov. 24, 1948, to: D. C. Warren, Glendive, Montana, attorney for Dawson County, Montana. Cecil N. Brown, Terry, Montana, attorney for Prairie County, Montana. Edna Yale, Alan

W. Yale and Ruby Yale, Moscow, Idaho. Ruth Peterson and Hans K. Petterson, Moscow, Idaho. A. W. Roeh, 71½ Broadway, Fargo, North Dakota, attorney or assignee for or of Scottish American Mortgage Company. [32]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify the foregoing volume, consisting of 33 pages, numbered consecutively from 1 to 33 inclusive, to be a full, true and correct transcript of all portions of the record in case 348, United States of America vs. Paul T. Markey, et al, designated by the parties as the supplemental record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said Supplemental Transcript amount to the sum of Fourteen and 90/100ths (\$14.90) Dollars; \$7.50 of which has been paid by the Appellant, Dawson County, Montana, and \$7.40 by Cross Appellants, Mary Hagen, et al.

Witness my hand and the seal of said Court at Great Falls, Montana, this 4th day of January, A. D. 1949.

(Seal)

H. H. WALKER,
Clerk as aforesaid.

[Endorsed]: No. 11821. United States Court of Appeals for the Ninth Circuit. Dawson County, Montana and Prairie County, Montana, Appellants, vs. Mary Hagen, E. B. Clark, Minnie R. Evans and United States of America, Appellees. Mary Hagen, E. B. Clark and Minnie R. Evans, Appellants, vs. Edna Yale, Allen W. Yale, Ruby Yale, Ruth Petterson, Hans Petterson, Scottish American Mortgage Company, Limited, United States of America, Dawson County, Montana and Prairie County, Montana, Appellees. Supplemental Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed January 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11821

DAWSON COUNTY, MONTANA, and
PRAIRIE COUNTY, MONTANA,
Appellants,
vs.
MARY HAGEN, et al.,
Appellees.

STATEMENT OF POINTS
AND DESIGNATION

Appellants intend to rely on this appeal on the contentions that the District Court of the United States for the District of Montana, being the trial court below, erred:

1. In failing and refusing to adopt as its findings and conclusions, the conclusions of law and findings of fact requested by appellants in writing, to wit: Its requested findings of fact numbered I to IX, both inclusive, and its conclusions of law numbered I and II, both inclusive lodged with the Clerk on November 10, 1948.

2. In adopting the appellees requested findings of fact and conclusions of law.

3. In its findings of fact No. 5 on pages 4, 5 and 6, paragraph 2 thereof, the statement,

“It is evident that Dawson County was over paid on said tracts the sum of \$3,315.06, and Prairie County, the sum of \$327.86.”

which statement is erroneous and contrary to the evidence and the agreements between the parties

under which lands embraced in this action were acquired by the government at a fixed consideration for a total acreage.

4. In finding of fact No. 8, page 7, paragraph 2, the statement, "That all tax deeds were taken on December 11, 1939 contrary to the record" (Transcript, page 97) which shows certain tax deeds taken in 1931 cover lands within the district.

5. In finding of fact No. 9, the statement by the County Clerk in the notice of sale is incomplete in failing to show that none of the lands involved herein were sold under the proposed Resolution and Notice. (Transcript pages 52-58).

6. In finding of fact No. 12, the statement is erroneous in that the negotiations for the sale of said lands were completed, the acreage fixed and the price fixed prior to the institution of the present action which was brought by the United States to quiet title. (Transcript pages 103-104).

7. Conclusion of Law No. 1, page 10 is not supported by the authorities quoted in *State ex rel Malott v. Board of County Commissioners*, 89 Mont. 37 296 Pac. 1, the said question was not before the court for a decision and the statements therein made are obiter dicta. In *Toole County Irrigation District v. Moody*, 125 F (2) 498, the *Malott* case was mentioned as authority for the proposition that in Montana bonds of an irrigation district were not general obligations but a mere charge on the land.

8. Conclusion of Law No. 2, page 10, paragraph 2, the conclusion of the court as to the meaning of

Chapter 63 of the Laws of 1937 is erroneous in that the Supreme Court of Montana decided to the contrary in the cases of *Cascade County v. Weaver et al*, 108 Mont. 1 90 Pac. (2) 164, and *State ex rel City of Billings v. Osten*, 91 Mont. 76, 5 Pac. (2) 562.

9. Conclusion of Law No. 5, paragraphs 1, 2, and 3, are contrary to the evidence which conclusively shows the counties sold fixed acreage of land for a fixed price prior to the institution of the present action and such agreements are binding upon both parties. (Transcript page 104).

10. In ordering judgment herein in favor of the appellee bondholders and against the appellant counties and in failing to order judgment for the appellants and against the appellees.

11. In rendering and entering final judgment on November 24, 1948, for the appellees and against the appellants.

The points of law upon which appellants intend to rely upon this appeal stated in general terms are as follows:

1. That the appellants obligated themselves by contract to sell to the United States the lands involved herein at a price fixed between the parties and such agreement is binding upon both parties.

2. That this action was brought to quiet title to the lands purchased by the United States from the appellants and the procedure taken was agreed upon and the compensation to be paid to the appellants stipulated prior to the institution of the action.

3. That the entry of judgment against the United States is contrary to law and the record which shows complete compensation agreed upon by the owners of the land was deposited in the registry of the court at the time the action was filed.

4. That there are no equity rules applicable to this action as the compensation was fixed by the United States and the owner of the lands which were free from all encumbrances under Montana law.

Appellants deem the entire record as certified to this court and now on file to be necessary for the consideration of the points and contentions above enumerated.

Dated this 29th day of December, A. D. 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Appellant.

Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Appellant.

Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed January 3, 1949. Paul P. O'Brien, Clerk.